

HPS-154 (September 2005)

September 23, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 05-3061

EDWARD C. KELLEY

vs.

COMMONWEALTH OF PENNSYLVANIA, ET AL.
(W. D. Pa. Civ. No. 03-cv-00299)

Present: SCIRICA, Chief Judge, WEIS and GARTH, Circuit Judges

Submitted are:

- (1) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);
- (2) The within appeal for possible summary action pursuant to 3rd Circuit Local Appellate Rule 27.4 and Chapter 10.6 of the Court's Internal Operating Procedures;
- (3) Appellee's motion to dismiss appeal;
- (4) Appellant's response to motion to dismiss appeal; and
- (5) Appellant's response to possible summary action

in the above-captioned case.

Respectfully,

Clerk

O R D E R

The foregoing request for a certificate of appealability is denied. By order entered September 20, 2004, the District Court dismissed Appellant's habeas corpus petition without prejudice for failure to exhaust state remedies. On October 15, 2004, Appellant filed a document in the District Court titled "Writ of Mandamus" that evidences his intent to appeal from the order dismissing his habeas petition; we therefore construe this document as Appellant's notice of appeal. See Shea v. Smith, 966 F.2d 127, 129-30 (3d Cir. 1992). As Appellant has not demonstrated that the District Court's dismissal of his habeas petition is debatable, he has not made a substantial showing of the

denial of a constitutional right. See 28 U.S.C. §§ 2254(b), 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000). The dismissal of Appellant's habeas petition without prejudice does not preclude Appellant from returning to federal court at the conclusion of his state court proceedings, within the limitations period. See 28 U.S.C. § 2244(d)(2).

To the extent that Appellant's notice of appeal filed on June 6, 2005, is taken from the District Court's order entered May 20, 2005, denying Appellant's "Motion to Transfer Case," a certificate of appealability is not required. As the District Court clearly did not err in denying the motion to transfer, we summarily affirm the District Court's order pursuant to 3rd Cir. I.O.P 10.6.

By the Court,

/s/ Weis
United States Circuit Judge

Dated: 24 October 2005
AWI/CC: ECK
PRL

Certified as a true copy and issued in lieu
of a formal mandate on 23 NOVEMBER 2005

Teste:
Clerk, U.S. Court of Appeals for the Third Circuit

Marcia M. Waldron
Marcia M. Waldron, Clerk